REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 6 OF 2016

MURINGI WILLY.....1ST PLAINTIFF/RESPONDENT

THOMAS WAMBUGU NJOGU.....2ND PLAINTIFF/RESPONDENT

VERSUS

MERCY MUTHONI NJOGU.....DEFENDANT/APPLICANT

RULING

By their plaint filed herein on 16th January 2016, the plaintiffs sought judgment for the removal of the defendant from land parcel No. MUTIRA/KAGUYU/4433 (the suit land herein). It was their case that whereas they were the registered proprietors of the suit land, the defendant had without any colour of right continued to occupy and use the same hence denying them the quiet enjoyment and use thereof. The record shows that on 18th February 2016, **ALEX NGUNGI CHOMBA** an advocate of this Court and who is acting for the plaintiffs filed an affidavit of service dated 17th February 2016 deponing that on 29th January 2016 at about 2.30 p.m. he had served the defendant with summons to enter appearance, plaint and verifying affidavit at her home in **RWAMBITI VILLAGE, KAGUMO SUB-LOCATION** but she declined to sign having accepted service.

As no appearance nor defence was filed by the defendant and upon application, interlocutory judgment was entered for the plaintiffs on 18th February 2016 and the matter came up for formal proof on 30th May 2016. In a judgment delivered on 30th September 2016, the plaintiffs claim was allowed together with general damages of Ksh. 5,000 for trespass.

The defendant has now moved to this Court under certificate of urgency and filed an application dated 10th November 2016 under ***Order 10 Rule 11 of the Civil Procedure Rules 2010*** seeking the following orders:

1. ***Spent.***

2. ***That there be stay of execution of the orders issued on 30th September 2016 and any other subsequent orders herein.***

3. ***That this Honourable Court be pleased to set aside the orders and the judgment issued on 30th September 2016.***

4. ***That the defendant be granted leave to file a defence in this matter.***

5. ***That costs of this application be in the cause.***

The application is based on the grounds set out therein and is also supported by the affidavit of the defendant.

The gravamen of the application is that the defendant and her children live on the suit land and only came to learn about the suit when they were served with a notice to vacate. That the defendant was not served with any plaint or summons and the process server should be called to testify on oath. That the suit land belongs to her husband and if they are evicted, they will be rendered destitute. Finally, that the defendant has a defence that raises triable issues as per the draft defence annexture - **MMN1.**

In opposing the application, the 1st plaintiff, **MURINGI WILLY**, has sworn a replying affidavit in which he has deponed, inter alia, that he purchased the suit land in exchange for another parcel No. MWERUA/GITAKU/1388 with the defendant and her husband as per the agreement dated 29th June 2015 – annexture **MW1.** That the defendant consented to that agreement and her family was to relocate to land parcel No. MWERUA/GITAKU/1388 and therefore it is not true that the defendant has no other land to relocate to as she signed minutes to that effect – annexture **MW 2**. That the defendant was duly served as per the affidavit of service dated 17th February 2016 which she refused to sign and this application should therefore be dismissed.

The application was canvassed by way of written submissions which have been filed both by **J. NDANA** advocate for the defendant and **A.N. CHOMBA** advocate for the plaintiffs.

I have considered the application, the rival affidavits and the submissions by counsel.

This application seeks the main order that this Court's judgment dated 30th September 2016 be set aside. The defendant's case is that she was not served with the plaint and summons. However, there is an affidavit sworn by **MR. A.N. CHOMBA** an advocate of this Court to the effect that he served the defendant at her home on 29th January 2016 and she accepted service but refused to sign. In her affidavit in support of this application, the defendant has asked me to summon the process server to testify on oath. If the process server was not an advocate of this Court, I would probably have acceded to that request. After all, ***Order 5 Rule 16 of the Civil Procedure Rules*** grants me the power to examine the serving officers on oath. I have no doubt in my mind, however, that the defendant was duly served with the plaint and summons by **MR. A.N. CHOMBA** advocate and accepted service but refused to sign. **MR. A.N. CHOMBA** is an advocate of this Court and I find it highly un-likely that he would have sworn a false affidavit knowing very well that it is an offence punishable with a fine upto Ksh. 5,000 or one month imprisonment if found guilty. Further, the defendant does not deny that her home is at **RWAMBITI** Village, Kagumo Sub-location within Kirinyaga County where **MR. A.N. CHOMBA** served her at 2.30 p.m. on 29th January 2016. There is no reason why **MR. A.N. CHOMBA** would have filed a false affidavit and none has been advanced by the defendant. I am satisfied therefore that the defendant was duly served with summons to enter appearance and plaint but did not enter appearance nor file a defence.

Counsel for the defendant has taken issue with the fact that there being no liquidated claim in the plaint, the interlocutory judgment entered against the defendant on 18th February 2016 was irregular and the suit should only have been set down for hearing once no defence was filed. Counsel is of course correct in that submission because the provisions of ***Order 10 Rule 4 to 6*** are clear as to when interlocutory judgment may be entered against a defendant who has failed to enter appearance or file a defence. The claim herein does not fall within the category of cases mentioned in ***Order 10 Rules 4 to 6 of the Civil Procedure Rules.*** However, that interlocutory judgment has not occasioned the defendant any prejudice because even without it, a date would still have been taken by the plaintiffs for the hearing of their claim as mandated by ***Order 10 Rule 9 of the Civil Procedure Rules*** which reads as follows:

> ***"Subject to rule 4, in all suits not otherwise specifically provided for by this order, where any party served does not appear, the plaintiff may set down the suit for hearing"***

There is a practice whereby Deputy Registrars and Executive officers routinely enter interlocutory judgment against parties who have not entered appearance or filed a defence and thereafter list the cases for formal proof even in cases that do not fall under the provisions of ***Order 10 Rule 4 to 6 of the Civil Procedure Rules***. However, the plaintiffs in such cases do not obtain any undue advantage and neither do the defendants suffer any prejudice. Both the litigants and their counsels are to blame for that practice. That complaint does not assist the defendant in this case since the suit was subsequently listed for hearing before the judgment sought to be set aside was delivered. Nothing really turns on that complaint.

The power to set aside a judgment obtained ex-parte is wide. In ***SHAH VS MBOGO 1967 E.A 116 HARRIS J.*** stated at ***Page 123*** as follows:

> ***"This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice"***

The above decision was up-held on appeal in ***MBOGO VS SHAH 1968 E.A 93.*** In the matter now before me, I am not in any doubt that the defendant was properly served with the summons and plaint. She went to sleep and the judgment obtained against her was a regular one.

The Court's discretion in setting aside any ex-parte judgment is however unfettered but must nonetheless be exercised judiciously and not upon the whims of the Court or capriciously. In ***GEETA SHAH & OTHERS VS OMAR SAID MWATAYARI & ANOTHER C.A CIVIL APPEAL No. 46 of 2008 MSA (2009) e K.L.R)***, the Court held as follows:

> ***"However, in a case where the summons was properly served and therefore the ex-parte judgment is regular, the Court, in the exercise of its discretion does not end there. It is enjoined, in a case where a draft defence is annexed in the application, to consider that draft defence and if having considered it, it comes to a conclusion that the draft defence raises matters that require the Court's investigation or put otherwise, if the draft defence is annexed to the application for setting aside raises arguable issues or triable issues, then the Court is required to exercise its discretion in favour of setting aside the exparte judgment though it is regular"***

The law then is that where there was no proper service, the Court has no discretion but to set aside the exparte judgment as a matter of course – ex debito justitiae. In such a case, the Court has no other jurisdiction other than to set aside such judgment – ***KANJI NARAN VS VELJI RAMJI 1954 21 E.A.C.A 20***. However, where as is the case in the matter now before me, the Court is satisfied that the service was proper, it still has a discretion to set aside the ex-parte judgment but on terms that are just. That explains why ***Order 10 Rule 11 of the Civil Procedure Rules*** reads as follows:

> ***"Where a judgment has been entered under this order, the Court may set aside or vary such judgment and any consequential decree or order upon such terms as are just".*** Emphasis added

I have looked at the annexed draft defence. It alleges that the suit land belongs to the defendant's husband and that if the plaintiff has the title thereto, it was obtained fraudulently. I would have expected the defendant's husband to have sworn an affidavit supporting the defendant's averments. That has not been done. The law is that allegations of fraud must be specifically pleaded. That has not been done either. The defendant also pleads that she and her six children have lived on the suit land for more than 20 years and the plaintiff should not have bought the land without involving her. I am guided by the law that a defence on the merits need not mean a defence that must succeed – ***PATEL VS E.A CARGO HANDLING SERVICES 197E E.A 75***. Bearing in mind this Court's unfettered discretion, the need to do substantive justice to the defendant who resides on the suit land with her children and which is not denied, the emotive nature of land disputes in this region and the circumstances of this case, I am persuaded, albeit reluctantly, to exercise that discretion in favour of the defendant. However, that will be on terms that this Court deems just.

Ultimately therefore and upon considering all the matters herein, I allow the Notice of Motion dated 10th November 2016 and make the following orders:

1. ***The judgment dated 30th September 2016 and all other orders flowing therefrom are hereby set aside on condition that the defendant pays the plaintiffs throw away costs which I assess at Ksh. 10,000 within 15 days of the delivery of this ruling.***

2. ***In default of (1) above, the said judgment and all consequential orders flowing therefrom shall revert.***

3. ***The defendant shall file and serve the defence within 15 days of this ruling.***

4. ***The defendant shall also meet the plaintiffs' costs of this application.***

B. N. OLAO

JUDGE

14TH JULY, 2017

Ruling delivered, dated and signed in open Court this 14th day of July 2017

Mr. Ngigi for Mr. Chomba for Plaintiffs present

Mr. Ndana for Defendant absent

Defendant present in person.

B. N. OLAO

JUDGE

14TH JULY, 2017